Supreme Court, U.S.
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No. 92-180

In The

Supreme Court of the United States

October Term, 1992

BTM CORPORATION, a Michigan Corporation,

Petitioner,

v.

ROBERT LILLEY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

RESPONDENT ROBERT LILLEY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. VERCRUYSSE
Counsel of Record
RONALD E. REYNOLDS
BUTZEL LONG
150 W. Jefferson, Ste. 900
Detroit, Michigan 48226
(313) 225-7000

Attorneys for Respondent Robert Lilley

September 30, 1992

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QUESTIONS PRESENTED

Respondent takes issue with Petitioner's paragraph A only as it suggests that Respondent was an "outside" salesperson. This is contrary to jury and lower court findings on this issue and is overreaching.

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Introduction

Justice is best served by denial of the Petition in this action. Contrary to the Petitioner's contention, the case does not involve weighty issues confronting the small business owner. Rather, the Petition represents just another attempt by Petitioner, after four motions for new trial and two appeals, to evade responsibility for its unlawful discharge of Respondent in retaliation for exercising rights provided by Michigan and federal law.

COUNTER-STATEMENT OF THE CASE

A. Proceedings Below

This case arises out of the termination of Respondent Robert Lilley ("Lilley") by Petitioner BTM Corporation ("BTM"). Lilley, a salesman for BTM, instituted this action, asserting, *inter alia*, claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (the "ADEA"), and the Michigan Elliott-Larsen Civil Rights Act, Mich. Comp. Laws Ann. § 37.2101 (West 1985) (the "Michigan Civil Rights Act").

The United States Court of Appeals for Sixth Circuit fairly and concisely summarizes the trial court proceedings in this case in its March 12, 1992 decision. *See* Sixth Circuit Opinion, Appendix to BTM Corporation's Petition For Writ of Certiorari at 1a-2a.[1] In short, Lilley has prevailed in three successive trials against BTM on a claim of

[1] The Appendix to the Petition will hereinafter be referred to as "Petition Appendix."

unlawful retaliation for exercising rights afforded him under the ADEA and the Michigan Civil Rights Act.[2]

B. Facts

BTM's rendition of the facts is untrustworthy. For example, BTM states that Lilley "agreed to be an independent travelling sales representative on [BTM's] behalf, to be paid on straight commission basis of five percent of his sales." Petition at 6, citing Lilley's 11/1/89 trial testimony at 26. Attached in Respondent's Appendix, *infra* at 5b-7b, is Lilley's 11/1/89 trial testimony at pages 26-27. Contrary to agreeing that he would be an "independent" salesman, Lilley makes clear that he sought *employment* from BTM (there is no dispute that Lilley's income was based on commissions).

Indeed, BTM omits to inform the Court that, in contrast to Lilley, BTM utilized numerous independent distributors in selling its products. *See* 4/11/90 Trial Court Opinion, Petition Appendix at 43a. It is undisputed that Lilley was not an independent distributor for BTM. Edwin Sawdon, the president of BTM, acknowledged at deposition the distinction between Lilley and the independent distributors:

> Q. You didn't care if they sold millions and millions of Tog-L-Loc systems and Lance-N-Loc systems because you would produce them and sell them to the distributor?

---

[2] The second and third trials were granted on BTM's motions for new trial. BTM also sought a new trial following the third jury verdict, which the trial court denied.

A. Well, at a period of time that was true but as I told you, it evolved towards we needed more control over the engineering, the type of machines, because we were getting into trouble. The product was losing credibility because of the lack of the good engineering that BTM could supply with their people.

Q. Okay, what I am trying to get to is you created the situation with Mr. Lilley where Mr. Lilley had to work with your engineering group closely and you on those quotes in order to sell as you wanted it done?

A. I demanded it.

Q. Okay, fair enough. You controlled it?

A. Yes.

* * *

Q. Isn't it true that you were making out better by having Mr. Lilley come into the marketplace for you *because he was doing under your control what the distributors weren't doing* and that is he was selling your whole system so that you could get your Tog-L-Loc and Lance-N-Loc systems sold to your clients in such a fashion that they would work successfully and then that would help your products to sell in the future?

A. Absolutely true.

Sawdon 7/15/88 dep. tr. at 102-103, 166, Respondent's Appendix *infra* at 2b-4b (emphasis added).

Petitioner also fails to adequately state the evidence relating to the willfulness issue. For example, Petitioner

suggests that Lilley had agreed to leave the company in October 1987. Petition at 8-9. This overstates the true facts. The evidence, as summarized by the Sixth Circuit and the trial court, showed that Lilley had announced his intention to retire, but withdrew it prior to BTM's decision to terminate him. Sixth Circuit Opinion, Petition Appendix at 2a-3a; 4/11/92 Trial Court Opinion, Petition Appendix at 45a-46a.

In addition, BTM omits the fact that its president, contrary to his own direct testimony, acknowledged under cross-examination that he terminated Lilley immediately upon learning that Lilley had filed age discrimination charges against BTM. 7/23/90 trial testimony of Edwin Sawdon at 107, Respondent's Appendix *infra* at 18b. The only reason that the "evidence conflicted" as to the termination of Lilley, Petition at 9, is because Sawdon contradicted his direct testimony by acknowledging Lilley's testimony as to the sequence of events and was impeached on the stand. *See generally* 7/23/90 trial testimony of Edwin Sawdon at 101-07, Respondent's Appendix *infra* at 12b-18b.

A more accurate and balanced statement of the facts can be found in the decisions of the Sixth Circuit and the trial court. *See* Sixth Circuit Opinion, Petition Appendix at 1a; 4/11/90 Trial Court Opinion, Petition Appendix at 36a. For purposes of this Brief in Opposition only, Lilley will rely on the facts as articulated by the Sixth Circuit and the trial court.

SUMMARY OF ARGUMENT

The Court should deny the exercise of its discretion in this case. BTM's overstatements and omissions alone are cause for denial of review.[3] More importantly, BTM is requesting that the Court overrule the jury's finding that Lilley was an employee based on a recent decision by this Court interpreting the Employee Retirement Income Security Act ("ERISA"). However, no matter what the federal law is, Lilley has met the state law test that he was an employee under the Michigan Civil Rights Act. In addition, it would be an exercise in futility to apply the common law agency test in this case as BTM requests. The evidence in this case supports the jury's determination even under the common law agency test. The finding of willfulness is correct as a matter of fact and law. Finally, the extraordinary procedural posture of this case justifies denial of the Petition.

ARGUMENT

A. The Petition Requests Reversal of Michigan Law Supporting the Employee Determination.

In its Petition, BTM challenges the application of the economic realities test in this case, and argues that the trial court should have employed the common law

[3] Supreme Court Rule 14.5 provides that:
The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

agency test in accordance with this Court's recent decision in *Nationwide Mutual v. Darden*, ___ U.S. ___, 112 S.Ct. 1344 (1992). The Court cannot grant the relief requested in the Petition without infringing upon state law.

This action is based on both the ADEA and the Michigan Civil Rights Act. Both laws prohibit retaliation against an individual for exercising his or her rights to file a charge of discrimination. Although not expressly limited to employees, the Michigan Civil Rights Act has been interpreted to exclude independent contractors from its scope of protection. *See McCarthy v. State Farm Ins.*, 170 Mich. App. 451, 428 N.W.2d 692 (1988); *Falls v. The Sporting News Publishing Co.*, 834 F.2d 611 (6th Cir. 1987). At the time of the first trial, both the Sixth Circuit and Michigan courts employed the "economic realities" test in determining employment status. The trial court instructed the jury that Respondent was suing under both the ADEA and the Michigan Civil Rights Act, instructed the jury on the economic realities test in determining employment status, and stated:

> If you find, based upon the preponderance of the evidence, that Robert Lilley was an employee of BTM, then he is within the protection of the federal law *and the state law*. If you find that Robert Lilley was not an employee of BTM, then he is not within the protection of these laws.

Jury Instructions, Petition Appendix at 82a-83a (emphasis added).[4]

---

[4] The sole question presented to the Court in BTM's Petition as to Lilley's employment status is whether the trial court

Despite having litigated the issue in front of the trial court less than one month before filing its Petition, BTM ignores the question of controlling state law except for a limited discussion in a single footnote. *See* Petition at 11, n. 14.[5] In the footnote, BTM essentially requests that the Court overrule controlling state law because, as BTM asserts without basis, continued application of the economic realities test in Michigan is in doubt due to *Nationwide Mutual*.

Michigan law does not support BTM's argument. The Michigan Supreme Court first indicated its preference for the economic realities test over the common law agency test in 1959 in *Tata v. Muskovitz*, 354 Mich. 695, 94 N.W.2d 71 (1959). The decision in *Tata* involved the application of the Michigan Workers Compensation Act. The court in *Tata* adopted the economic realities test by adopting the

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should apply the economic realities test or the common law agency test. BTM's suggestion in the Petition that the trial court failed to properly instruct on the economic realities test, an issue BTM lost on appeal, is irrelevant to this proceeding. The only question raised by BTM in the Petition is whether the trial court employed the proper test, not whether it properly instructed on the test it applied.

[5] BTM filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) seeking a new trial on the employee determination in this case based on the decision in *Nationwide Mutual*. In opposition to the motion, Lilley argued, *inter alia*, that Michigan state law provided an independent basis for the verdict. The motion was denied in a hearing held July 9, 1992. BTM subsequently filed an appeal of the trial court's ruling, which is currently pending. United States Court of Appeals for the Sixth Circuit, case no. 92-1843.

dissenting opinion in *Powell v. Employment Security Commission*, 345 Mich. 455, 464, 478, 75 N.W.2d 874 (1956). In *Powell*, the dissenting justice argued for the application of the economic realities test in lieu of the common law right to control tests. *See also Falls*, 834 F.2d at 614 ("whether or not plaintiff was an employee of TSN, as contemplated by the Michigan [Civil Rights Act], must be resolved by reference to an 'economic reality' test developed by Michigan courts to replace the common law 'control' test.").

The economic realities test has subsequently been applied in interpreting remedial social legislation, like the Michigan Civil Rights Act. *See e.g. William v. Cleveland Cliffs Iron Co.*, 190 Mich. App. 624, 476 N.W.2d 414 (1991), lv. den. 439 Mich. 971, 483 N.W.2d 615 (1992) (workers compensation law); *McCarthy v. State Farm Insurance Co.*, 170 Mich. App. 451, 428 N.W.2d 692 (1988) (Michigan Civil Rights Act); *Capital Carpet Cleaning and Dye Co. v. Employment Security Commission*, 143 Mich. App. 287; 372 N.W.2d 332 (1985) (unemployment compensation law).

BTM's attempt to rely on *Michigan v. Long*, 463 U.S. 1032 (1983), and related cases is without merit. The decision in *Michigan v. Long* involved review of a state-court decision on constitutional grounds. The Court stated:

> Our requirement of a "plain statement" that a decision rests upon adequate and independent state grounds does not in any way authorize the rendering of advisory opinions. Rather, in determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, see *Abie State Bank v. Bryan*, 282 U.S., at 773, 75 L. Ed. 690, 51 S.Ct. 252, we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that

> the state court rested its decision primarily on federal law.

463 U.S. at 1042. The presumption does not apply in this case. The instructions to the jury make clear that Lilley's claim is premised on both state and federal law. It is simply conjecture to argue that the employee determination rested to any greater degree on federal law than state law.

Contrary to BTM's unsupported argument, Michigan courts do not simply follow the federal lead in this area. Rather, Michigan courts, since 1959, have regularly applied the economic realities test when interpreting Michigan social legislation. BTM never sought bifurcation of the state law claims in this case. It is without legal basis to challenge Michigan's application of the economic realities test. The Court is without jurisdiction to overrule the verdict in so far as it properly relies on Michigan law. Therefore, the Court should decline BTM's request to overturn the jury's employee determination.

B. Respondent Is An Employee Under the Common Law Agency Test.

BTM devotes most of its Petition to reiterating to the Court its decision in *Nationwide Mutual*. Yet BTM never addresses the most critical question, which is: would application of *Nationwide Mutual* in this case likely change the outcome? The answer is no.[6]

---

[6] Lilley will not at this stage address the issue of whether the Court should expand the application of the ruling in *Nationwide Mutual* under ERISA to the ADEA, but reserves the issue should the Court accept the Petition. Lilley submits that there

The evidence in this case supporting Lilley's employee status is overwhelming and more than meets the requirements of the common law agency test stated in *Nationwide Mutual:*

> [W]e adopt a common-law test for determining who qualifies as an "employee" under ERISA, a test we most recently summarized in *Reid*:
>
> > In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." 490 U.S., at 751-752, 104 L. Ed. 2d 811, 109 S.Ct. 2166 (footnotes omitted).
>
> Cf. Restatement (Second) of Agency § 220(2) (1958) (listing nonexhaustive criteria for identifying master-servant relationship); Rev. Rul.

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are other more compelling reasons for the Court to deny review in this case.

> 87-41, 1987-1 Cum. Bull. 296, 298-299 (setting forth twenty factors as guides in determining whether an individual qualifies as a common-law "employee" in various tax law contexts). Since the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB v. United Ins. Co. of America*, 390 U.S., at 258, 19 L. Ed. 2d 1083, 88 S.Ct. 988.

___ U.S. ___, 112 S.Ct. at 1348-49.

This test, as articulated above, is not remarkably distinct from the economic realities test employed by the Sixth Circuit and Michigan courts. *See e.g.* Sixth Circuit Opinion, Petition Appendix at 4a. Contrary to the reasonable expectations test the Court rejected in *Nationwide Mutual*, both the common law agency test and the economic realities test are objective in nature. Under both tests, the factfinder is asked to weigh objective factors in determining whether an individual is an employee. Both tests look to the purported employer's right to control the individual.

In this case, virtually all of the objective factors support Lilley's employee status:

> BTM exercised control over Lilley. Although Lilley set his own hours and vacation schedule, such flexibility is not sufficient to negate control. *See, e.g., Snell*, 875 F.2d at 806. BTM had the authority to remove Lilley from particular sales. In at least one instance, BTM exercised this authority, removing Lilley from a deal while negotiations were still taking place and replacing him with another employee. In addition, BTM required Lilley to obtain its approval

before he could quote a price to a potential buyer.

Although he paid some of his own expenses, Lilley did not make an investment in the business. BTM supplied Lilley with an office, secretarial services, business cards and stationery bearing BTM's name, brochures and stickers advertising BTM's products, and telephone privileges.

In addition, Lilley was integrated into BTM's normal business operations. After BTM approved a price quotation, Lilley was authorized to sign for and bind BTM. He also attended weekly meetings of BTM's sales staff, whose members are undisputedly employees. Lilley went on "troubleshooting" trips, involving the resolution of problems that customers had with BTM's products after purchase. Finally, BTM invited its customers to visit its facility and offered that "our people will give you all the help you need. . . . " Lilley was listed among BTM's "people."

It is also significant that Lilley sold only BTM's products. Although this is by no means determinative, it provides support for the existence of an employment relationship, particularly when viewed within the totality of the facts of this case.

In light of the totality of circumstances in this case, there was sufficient evidence to raise a question for the jury.

Sixth Circuit Opinion, Petition Appendix at 4a-5a; *See also* Trial Court Opinion, Petition Appendix at 42a-44a, 52a.[7] The distinctions between Lilley and the numerous independent distributors selling BTM products similarly support the verdict on employment status. Indeed, BTM's president testified that he had control over Lilley's performance, which he lacked over the independent distributors. Citation.

BTM requests that the Court take the extraordinary step of ordering a fourth trial in this case without any real effort to show that the outcome would differ. The evidence of employee status in this case is overwhelming, regardless whether the common law agency test is applied. It would, more likely than not, be an exercise in futility for the Court to order a fourth trial based on *Nationwide Mutual*. This provides a sound reason for the Court to decline to exercise its discretionary review in this case.

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[7] The most significant factors weighing in favor of BTM's argument are the provision of employee benefits and tax treatment. These factors are within the control of the company. BTM's decision to deny benefits to Lilley and to pay him pursuant to a Form 1099 rather than withhold taxes from his pay offer obvious savings to BTM. For this reason, it seems unlikely that the Internal Revenue Service would put any significant weight on how an employer treated an individual for tax purposes, provided that other factors favored employee status. Further, BTM's Petition omits that BTM's accountant prepared Lilley's tax returns. 11/7/89 Lilley trial testimony at 452-54, Respondent's Appendix *infra*, at 8b-10b. It is impossible to reconcile the manner within which BTM controlled Lilley with any objective notion that he was an independent contractor.

C. Justice Requires Denial of the Petition.

Principles of judicial economy also weigh against the exercise of the Court's discretion in this case. It has been more than five years since BTM discharged Lilley. In that time, Lilley has endured three separate trials and a final appeal. The issue of the appropriate standard to apply in interpreting employment status under the ADEA is not brought to the Court because BTM vigorously litigated it at the trial and appellate levels. BTM did not. Rather, fortuitously for BTM, the Court happened to rule in *Nationwide Mutual* while this case was pending.[8] It makes no sense at all to apply the reasoning in *Nationwide Mutual*, a case that went no further than summary judgment, to a case that has been tried three times already. As the trial court correctly noted in ordering the second trial: "The requirement of a new trial creates judicial waste as well as waste of a considerable expenditure of time and money by Lilley and BTM." 4/11/90 Trial Court Opinion at 58a. Principles of judicial economy weigh heavily against further aggravating the waste incurred already in this case.

D. The Lower Courts Did Not Err With Regard To Willfulness.

BTM's argument as to willfulness is also without merit. There is simply no evidence from which to infer that BTM's termination of Lilley was anything but intentional or reckless.

BTM unsuccessfully attempts to distinguish the decision in *Powell v. Rockwell Int'l Corp.*, 788 F.2d 279 (5th Cir.

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[8] BTM argued *Nationwide Mutual* to the Sixth Circuit in seeking rehearing. The court denied rehearing.

1986). In *Powell*, like this case, the plaintiff filed an age discrimination charge against his employer and was subsequently discharged. The plaintiff alleged that the discharge was in direct retaliation for the filing of the discrimination claim. The employer, like BTM, asserted an alleged nondiscriminatory reason for the termination. The employer stated that the plaintiff was discharged for removing a sensitive document from the company. The Fifth Circuit Court found that, under those circumstances, the jury finding of retaliatory discharge necessarily found willfulness as defined by the Supreme Court in *TransWorld Airlines, Inc v. Thurston*, 469 U.S. 111, 105 S.Ct. 613 (1985):

> The jury specifically found that Rockwell terminated Powell in retaliation for filing his ADEA claim. McCann, a Rockwell official, testified that he knew that retaliatory discharge was a violation of law. In any event, if Rockwell officials did not "know" that firing an employee in retaliation for filing an ADEA claim was illegal then that action was certainly "reckless." In the context of the present facts, therefore, the jury finding of retaliatory discharge necessarily found "willfulness" as defined by *Thurston*.
>
> * * *
>
> We need not decide whether in all cases a finding of retaliation necessarily finds *Thurston* "willfulness." On the present facts, there is no doubt that the jury's finding of retaliatory discharge found willfulness. Rockwell's only explanation for Powell's discharge was that he was fired for removing a sensitive document from the company. Thus, the only question before the jury was whether Powell was discharged for

> violating company policy, or whether he was discharged for filing his ADEA claim. Because the jury specifically found that Powell was discharged for filing the ADEA claim, there exists no possibility of any good faith action upon which Rockwell can rely to avoid liquidated damages. In other words, any assertion that Rockwell acted in good faith in terminating Powell and that its actions were not in reckless or knowing violation of the ADEA was rejected by the jury when the jury found that the justifications for firing Powell offered by Rockwell were pretextual.

Powell, 788 F.2d at 286-287.

Like the employer in *Powell*, BTM offered only one reason for Robert Lilley's termination. Sawdon testified that he terminated Lilley because of Mrs. Lilley's alleged outburst and interference with BTM employees. The credible evidence, however, demonstrated that Sawdon terminated Lilley immediately after learning of the age discrimination charge. By his own admission, Sawdon terminated Lilley prior to any alleged interference by Mrs. Lilley with BTM employees. As with the *Powell* case, in the context of these facts, the jury finding of retaliatory discharge necessarily found willfulness. *See also Rose v. Hearst Magazines Div., Hearst Corp.*, 814 F.2d 491, 493 (7th Cir. 1987) (following *Powell*).

BTM's attempt to hide behind the purported ignorance as to Lilley's employment status should not shield it from a finding of willfulness. As *Powell* expressly demonstrates, such ignorance is, at the very least, reckless. The issue is not whether or not BTM thought that Lilley

was an employee. Rather, the issue is whether BTM intentionally or recklessly terminated Lilley in retaliation for having filed the charge of age discrimination. The Sixth Circuit correctly held that, under the facts of this case, a separate instruction on willfulness was unnecessary. Likewise, a fourth trial on willfulness, as sought by BTM, is unnecessary.

CONCLUSION

BTM's Petition seeking a fourth trial in this case should be denied. BTM has not been forthright with the Court in addressing the relevant facts and issues. BTM improperly seeks to have this Court infringe on Michigan law. The facts of this case and the relevant caselaw do not support BTM's argument for another trial as to employee status or willfulness. Finally, principles of judicial economy dictate against the Court exercising its discretion of review in this case.

For these reasons, Robert Lilley requests that the Court deny the Petition and award him costs and fees.

Respectfully submitted,

ROBERT M. VERCRUYSSE (P21810)
Counsel of Record
RONALD E. REYNOLDS (P40524)
BUTZEL LONG
150 W. Jefferson, Ste. 900
Detroit, Michigan 48226
(313) 225-7000
Attorneys for Plaintiff

Dated: September 30, 1992

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Appendix A

United States of America
United State District For
The Eastern District of Michigan
Southern Division

Civil Action NO. 87-CV-30088-PH

Robert Lilley,

Plaintiff,

v

BTM Corporation, a Michigan Corporation,

Defendant,

Deposition testimony taken in the above-entitled matter on July 15, 1988.

* * *

[p. 102] quotes to you and you had to initial, is that right?

A Yes.

Q No other five percenter was like that?

A The five percenters were done within the distributor and it was an internal thing with the distributor, yes.

Q Was it the distributor that stood to lose the money?

A Yes, he was the same as me. He may have initialed the five percenters' quotes, I don't know.

Q With respect to Mr. Lilley, you made him work more closely with your engineering group because you stood the risk of loss on his quotes?

A I made him work very closely because he did not have the expertise to quote as a five percenter anymore. He was losing it. He wouldn't relate or couldn't relate.

Q But with respect to the other five percenters that were working at the distributors, if they sold things that the distributors approved, you still made money because you were selling it to the distributors at a price you approved, is that it?

A Sure.

Q So you didn't care if they sold the distributors down the river, did you?

A Rephrase that.

Q You didn't care if they sold millions and millions of Tog-L-Loc systems and Lance-N-Loc systems because you [p. 103] would produce them and sell them to the distributor?

A Well, at a period of time that was true but as I told you, it evolved towards we needed more control over the engineering, the type of machines, because we were getting into trouble. The product was losing credibility because of the lack of the good engineering that BTM could supply with their people.

Q Okay, what I am trying to get to is you created the situation with Mr. Lilley where Mr. Lilley had to work with your engineering group closely and you on those quotes in order to sell as you wanted it done?

A I demanded it.

Q Okay, fair enough. You controlled it?

A Yes.

Q All right. Mr. Lilley complied with your wishes but that took your time, is what you are telling us?

A Mr. Lilley would get involved with a project and he would do his best in laying it out but like most salesman, they are looking for the next sale and they want somebody else to take up the strain. They move on to greener pastures or another sale trying to leave the burden up to someone else to take care of them. Well, this is the problem that was starting to become not cost effective for our company and we go back to the October 19th date. Looked like a blessing in disguise

* * *

[p. 166] A Yes, true, but I just explained to you that five percent is more than 23 percent when you tear the machine down so he was receiving more commission under that type of a description than the other way. He was making out better than a distributor.

Q But you are making out better, too?

A No, I am not making out better. I have to take a chance.

Q You have to wait until I finish asking the question before you start answering the question because I had not completed at the time the whole question, okay? Isn't it true that you were making out better by having Mr. Lilley come into the marketplace for you because he was doing under your control what the distributors weren't doing and that is he was selling your whole system so that you could get your Tog-L-Loc and Lance-N-Loc systems sold to your clients in such a fashion that they would work

successfully and then that would help your products to sell in the future?

A Absolutely true.

Q Okay, fair enough.

MR. VERCRUYSSE: Okay, let's take a break.

(Recess taken).

MR. VERCRUYSSE: I am going to adjourn this deposition now. I notice that the time is 3:24 on my

* * *

Appendix B

United States of America
United States District For
The Eastern District of Michigan
Southern Division

Civil Action NO. 87-CV-30088-PH

Robert Lilley,

Plaintiff,

v

BTM Corporation, a Michigan Corporation,

Defendant,

Proceedings had and testimony taken in the above-entitled matter before HONORABLE AVERN L COHN, District Judge, United States District Court Detroit, Michigan on Wednesday, November 1, 1989.

* * *

[p. 26] call? Who said what to whom, as best you can recall?

A I talked to him about the building a little bit, and told him that I would like to come down and have a chat with him. And he invited me down for a chat. So, we talked and we had an interview, if you will, and he asked me to prepare a resume and return, which I did.

Q During the chat, did he ask you questions about your background, where you had worked?

A Yes.

Q And did you tell him what you told the jury, basically, that is, the kinds of companies you had worked with in the automobile industry?

A Yes, I indicated that I had many contacts with the automotive companies, and that it would be beneficial to his company with the background I had.

Q What did Mr. Sawdon say to you, if anything, about your background and whether – what did he say?

A I can't give you exact words, but the feeling that I got from Mr. Sawdon was that it looked as if what I – my background would lend itself to a person who could be beneficial to his company.

Q Were you asking for a position as a manufacturer's representative?

A No, I asked to become an employee of BTM.

[p. 27] Q What happened next in the pursuit of your employment with BTM?

A I asked Mr. Sawdon, you know, what kind of remuneration it would be.

And he said, well, how much do you need?

So, I told him what I expected, based on what I was getting at St. Clair Metal Products.

And, he said, I can't afford that.

Q Well, how much, the jury's going to want to know how much you told him you thought you should be paid, so what did you say to him specifically?

A $30,000.00.

Q And what did Mr. Sawdon say to you about the $30,000.00?

A He said, this is a small company, we can't afford that kind of salary.

Q What did he say to you then?

A Then he offered me the alternative of a commission sale of five percent.

Q What what specifically did he say you would receive the five percent commission sales on?

A When we discussed commission, it was based on customers that I could procure, and what business I could bring in from those customers.

* * *

Appendix C

United States of America
United States District For
The Eastern District of Michigan
Southern Division

Civil Action NO. 87-CV-30088-PH

Robert Lilley,

Plaintiff,

v

BTM Corporation, a Michigan Corporation,

Defendant,

Proceedings had and testimony taken in the above-entitled matter before HONORABLE AVERN L COHN, District Judge, United States District Court, Detroit, Michigan on Tuesday, November 7, 1989.

* * *

[p. 452] how much Christine was expected to fund the boat; correct?

A Not correct.

Q It's true that you kept your finances separate correct?

A Yes.

Q Is it true that one of the problems was that Christine did not like to sleep on the boat?

A Not true.

MR. PILCHAK: Excuse me one moment, Your Honor, may I confer?

THE COURT: Sure.

MR. PILCHAK: I believe I'm finished with my questioning. I have no further questions.

REDIRECT EXAMINATION BY MR. VERCRUYSSE:

Q Mr. Lilley, let me first talk about your tax returns since that's what the jury has heard the latest in terms of events that have transpired.

Mr. Lilley, you said you went to Mr. Boyce in response to Mr. Pilchak's questions. How did you go to Mr. Boyce? How did that happen?

A Mr. Sawdon introduced me to Mr. Boyce in the offices at BTM, and I talked to Mr. Boyce at that time about doing my tax.

Q Now, did you know that Mr. Boyce was the company [p. 453] accountant?

A I was told that, yes.

Q Now, earlier you testified with respect to Exhibit Number 1, Plaintiff's Exhibit Number 1, the book, that you began working on BTM's sales in November of 1982; is that right?

A When I started making calls, yes.

Q Now, do you recall the month when you received your first check from BTM?

A It was late in the year.

Q Late in what year? Was it in 1982?

A In '83.

Q So as Mr. Pilchak has said your first check came late in the year of '83; is that correct?

A Yes.

Q Now, at the time you received your check, did you have any advance knowledge that you were going to be paid on a 1099?

A Not at that time.

Q When did you first find out that you were being paid on a 1099?

A When I was handed the 1099 and I went to Mr. Boyce and said this is what they gave me.

Q Why did you go to Mr. Boyce?

A Well, he was the company's accountant, and I felt that [p. 454] he was aware of what was going on in the business, that he would be one who would understand my position.

Q Now, did you fill out the name, manufacturer's representative on here? Did you draft this out the first time, or did Mr. Boyce draft it out?

A Mr. Boyce.

Q So that was the term he selected?

A Yes.

Q Now, I notice that in the subsequent years with respect to occupation or name, we'll take a look, for example, at 13D, your 1986 return, it indicates that your occupation is sales engineer, it doesn't say manufacturer's representative; or does it?

A That's correct.

Q As a matter of fact, the term manufacturer's representative only appears in that 1983 return; doesn't it?

A Yes.

Q Mr. Lilley, as I understand the tax laws as you go through a year you're being paid or expected to be paid,

you have to make estimated payments throughout the year. In 1983, had you made any estimated payments throughout the year?

A No, I did not.

Q Did you get assessed a penalty as a result –

* * *

APPENDIX D

UNITED STATES OF AMERICA
UNITED STATES DISTRICT FOR
THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION NO. 87-CV-30088-PH

ROBERT LILLEY

Plaintiff,

v.

BTM CORPORATION, a Michigan Corporation,

Defendant.

Proceedings had and testimony taken in the above-entitled matter before HONORABLE AVERN L COHN, District Judge, United States District Court, Detroit, Michigan on Monday, July 2, 1990.

* * *

[p. 101] A Well, that's what he told me, yes.

Q And Mr. Allison knew that, didn't he, told you that?

A I'm not sure.

Q You heard Mr. Allison testify in the courtroom?

A Yes.

Q You talked with Mr. Allison before you devised this policy, didn't you?

A I'm not sure that I devised it before I talked to him. I probably did that.

Q And this policy was devised some time in April or March of 1987; right?

A Oh, it probably came before that.

Q Sometime after you advertised for a replacement for Mr. Lilley.

A We understood what the situation was that we were facing and we were going to make a change.

Q All right.

July 10, 1987, Mr. Lilley comes to your office around 4:15, 4:30 in the afternoon, doesn't he?

A Is that the 8th or 10th?

Q The 10th.

A If it's on a Friday, yes.

Q And he tells you about his week and about the day before when he met with Donald Peterson, doesn't he?

[p. 102] A I can't really recollect that conversation. That's what he says he did.

Q Okay.

But you can't recall that conversation clearly, you know he was talking about business in any event?

A Yes.

Q All right.

And then Mrs. Lilley comes to the door around 4:15 or 4:30, doesn't she?

A Yes.

Q And you go to the door and greet her and bring her into the office, don't you?

A I do.

Q And then Bob Lilley turns again to his request of you that you not force him to leave the company, doesn't he?

A Not at that time he didn't, no.

Q Well, sometime later in that conversation he says, listen to my question, I want you to answer it yes or no. He says to you, that I don't want to leave the company, I want to continue with the company, can we do that?

A At some time he did, yes.

Q Okay.

[p. 103] And you tell him, no, we're going to go ahead with the plan, it's true, isn't it, yes or no?

A That's true.

Q And right after that Bob Lilley explains to you that he had told you that if he had to go to the outside to get help, he would do that, that he had filed a charge of age discrimination?

A Not at that time he didn't, no.

Q Shortly thereafter he does, doesn't he?

A You want me to explain that?

Q No, I want you to answer my question, yes or no?

MR. HEYBOER: Your Honor, I will object at this point. Unless he defines what shortly is, how can anybody know what he's talking about?

THE COURT: The witness said he can't answer the question yes or no. You'll have an opportunity to examine the witness.

MR. HEYBOER: I didn't hear the witness' answer. I'm sorry, your Honor.

THE COURT: The witness, I heard him say he could not answer that yes or no.

MR. VERCRUYSSE: That's what he said, your Honor.

Q (By Mr. Vercruysse, continuing:) You do recall during that conversation that Mr. Lilley told you [p. 104] that he had filed a charge of age discrimination, don't you, yes or no?

A At some time in that, yes.

Q And it was immediately after Mr. Lilley told you that that you told him, you might as well pack your bags and get out of here; isn't that right?

A No.

Q That's not what you recall now?

A It wasn't true.

Q Let me ask you this question.

After that, Mrs. Lilley stands up and says to you, you can't do that, Mr. Sawdon, that's age discrimination and retaliation, doesn't she?

A No, you've got it wrong.

Q I've got it wrong.

Then you go out of the office, yes or no, to get Mr. Archer, after Mrs. Lilley speaks?

A Yes.

Q Yes.

And you go get Mr. Archer to have him come back in and witness what's going on in your office; isn't that right?

A Yes.

Q And Mrs. Lilley then leaves your office and goes over to get Jack McGuinnes; isn't that right?

[p. 105] A Yes, he does.

Q And Mr. Lilley gets up after that and leaves your office, too, to get – to go with Mrs. Lilley; isn't that right?

A I believe so, yes.

Q And you never go back into your office, do you?

A I don't believe so.

Q Okay.

And Mr. Lilley goes down to his office to pack up and you call him and tell him you want to think about this over the weekend, don't you?

A Yes.

Q Is it fair to say that you're not sure what happened on that July 10, 1987 meeting?

A No, I don't think it's fair.

Q Page 98, prior proceeding, Line 10.

"Q Do you recall my having asked you questions about this in your deposition?

"A Yes.

"Q You looked at it last night?

"A I did.

"Q Fair enough.

"Turning your attention to Page 120 and 121, is it fair to say, Mr. Sawdon, that this was an event [p. 106] that created some emotion for you?

"A Yes.

"Q You don't have a perfect recall of everything as to how it occurred exactly, do you?

"Not exactly.

"Q And as a matter of fact, your note [sic] sure whether or not Bob Lilley was telling you about the charge of age discrimination when Christine interrupted him; isn't that true?

"A I think that's what was going on, yes. Luckily I can't remember a lot of things happening at that time.

"Q And as Bob Lilley was telling you about the charge of age discrimination, you're telling us that Christine interrupted him?

"A I'm not sure.

"Q And then what happened is you went out of your office and you went around the corner to get Mr. Archer; is that right?

"A Yes.

[p. 107] "Q And Mrs. Lilley went across the reception area where the trees were to Jack McGuinnes' office?

"A Right, yes."

Did I read that correctly?

A I believe you did.

Q Page 99 to 100, and then Page 102.

Line 21

"Q Now right after Bob Lilley told you about the charge of age discrimination you told him, might as well pack up your bags and get out of here; isn't that right?

"A It wasn't a result of saying the age discrimination" – I've got to restate that –

"A It wasn't the result of saying that of age discrimination, I didn't have any problem with that.

"Q You didn't have any problem with that but right after he told you about it, you told him to pack up his bags and get out of there; right?

"A I did."

A That's correct.

* * *